



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC APPEAL NO. 1 OF 2019**

**JAMES GATORU KAMANDE.....APPELLANT**

**VERSUS**

**NTARI OLE SANKAIRE.....1<sup>ST</sup> RESPONDENT**

**ISSACK SAYIANKA NTARI.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement of the Chief Magistrate at Ngong Hon. S. N. Mbungi made on 14<sup>th</sup> December, 2018 in Ngong ELC No. 7 of 2018)*

**JUDGEMENT**

**Introduction**

By a Memorandum of Appeal dated the 18<sup>th</sup> January, 2019, the Appellant appeals against the whole of the Judgement delivered on the 14<sup>th</sup> December, 2018 by the Chief Magistrate's Court at Ngong. The genesis of this appeal is the Judgement of the Chief Magistrate Hon. S N. Mbungi in the Ngong ELC No. 7 of 2018 where he dismissed the Plaintiff's suit and allowed the Respondents' Counterclaim dated the 23<sup>rd</sup> October, 2015 and filed in Court on 5<sup>th</sup> November, 2015 where they had sought for the following orders:

- a) An order of declaration that the Plaintiff acquired parcel number Kajiado/ Ol Choro Onyore/ 250 fraudulently.
- b) An order that the registration of Title Number Kajiado/ Ol Choro Onyore/ 250 in the Plaintiff's name is revoked and transferred to the 1<sup>st</sup> Defendant.
- c) In the alternative the Plaintiff is ordered to pay the 1<sup>st</sup> Defendant the value of the suit property at the current rates.
- d) Costs of this suit.
- e) Any other relief that this honourable court shall deem fit to grant.

The appellant being dissatisfied by the Judgement filed an appeal at the Environment and Land Court of Kenya in Kajiado on 21<sup>st</sup> January, 2019.

The Memorandum of Appeal contained the following grounds;

1. That the learned trial Magistrate erred in law and in fact by believing each and every allegation of fraud against the Appellant yet the said allegations were not strictly proved to the required standard by the Respondents.
2. The learned Magistrate erred in law and in fact when found that because there was no written agreement for sale title No. Kajiado/ Ol Choro Onyore/ 250 between the Appellant and the Respondent, there was no enforceable contract between the parties despite the fact that the transaction took place in 1982.
3. The learned Magistrate erred in law and in fact when he held that there was no Land Control Board Consent authorizing transfer of title No. Kajiado/ Ol Choro Onyore/ 250 yet the Respondents did not provide any evidence to prove this allegation.
4. The learned Magistrate erred in law by believing the Respondents and holding that there was no legal and valid transfer of title No. Kajiado/ Ol Choro Onyore/ 250 to the Appellant yet the Respondents did NOT provide any evidence to prove this allegation.

5. The learned Magistrate erred in law and in fact when he ignored the evidence of the Land Registrar Kajiado North Registry and held that the transfer of title No. Kajiado/ Ol Choro Onyore/ 250 in the name of the Appellant was done unprocedurally.

6. The learned Magistrate erred in law and in fact by holding that the Appellant had never taken possession of title No. Kajiado/ Ol Choro Onyore/ 250 without evidence being provided by the Respondents to prove this claim.

7. The learned Magistrate erred in law and in fact by disregarding all the documents presented to court by the Appellant to prove his case.

The Appellant prays that:

a) The Appeal be allowed with costs to the Appellant.

b) The Judgment of the lower court be set aside and be substituted with a finding that the Respondents themselves, their servants, relative, workmen, agents or any other person claiming under them be restrained from entering and or erecting or causing to be erected any structures on title No. Kajiado/ Ol Choro Onyore/ 250 or in any way interfering with the Appellant's use and enjoyment of the said property.

c) The Respondents do vacate from title No. Kajiado/ Ol Choro Onyore/ 250 or in the alternative an order for their forceful eviction do issue.

The Appellant and the Respondents filed their respective submissions to canvass this Appeal.

### Submissions

The Appellant in his submissions abandoned grounds 1, 2, 6 & 7 of his Memorandum of Appeal. He proceeded to only submit on grounds 3, 4 & 5 of the Memorandum of Appeal. He submitted that the Learned Magistrate erred in law and fact as he was not supposed to provide evidence on whether the consent of the Land Control Board was procured. He insisted the onus of proof was upon the Respondents as they were the ones who alleged there was no consent of the Land Control Board obtained. Further, that the Land Registrar Mr. Mwinzi had testified that the Land Control Board consent was obtained and used to transfer the suit land. He further submitted that the Learned Magistrate erred in law and in fact as it was upon the 1<sup>st</sup> Respondent to prove there was no transfer duly executed by himself in favour of the Appellant. He contended that the 1<sup>st</sup> Respondent did not adduce any evidence to confirm that his signature or thumbprint was a forgery. Further, he did not state why he never reported to the Police nor why he never took any action against the Appellant. He reiterated that the Learned Magistrate erred in law and fact by ignoring the evidence of the Land Registrar, Kajiado North and hold that the transfer of suit land to the Appellant was done unprocedurally. He relied on the decision of **David Sironga Ole Tukai Vs Francis Arap Muge & 2 Others (2014) eKLR** to buttress his arguments. He further submitted that the lower court did not make a finding that the Appellant acquired title to the suit land fraudulently or through a corrupt scheme. Further, that the Court determined the matter on issues not pleaded.

The Respondents in their submissions stated that there was no legal and or valid transfer of the suit land without a written Sale Agreement. Further, that the Appellant never took possession of the suit land and had not established a proprietary interest over it. They relied on the cases of **Hannington Malingi Janji V Katana Pekeshe & 7 Others (2013) eKLR; Nairobi Permanent Markets Society V Salim Enterprises & Others (1995 – 1998) 1 EA 232; David Ole Sankori V Meliare Mpata (2018) eKLR; Morgan Vs Stubenitsky (1973) KLR 188; and Wagichiego Vs Gerald (1988) KLR 406** to support these averments. They have submitted that there was no legal or valid transfer as there was no consent of the Land Control Board. Further, that the Appellant admitted that that no Land Control Board Consent to transfer was obtained by the parties to the alleged transaction. To buttress their averments, they relied on the decisions of **SBI International Holdings Ag (Kenya) V Reuben Kipkorir J. T Bore (2014) eKLR; Omuse Onyapu v Lawrence Opuko Kaala Civil Appeal No. 21 of 1992; Silas Bartonjo Kiptala V James Kipkemboi Murei (2013) eKLR; David Sironga Ole Tukai V Francis Arap Muge & 2 Others (2014) eKLR; Kariuki v Kariuki (1983) KLR 225; and Agnes Wambui Kihara V Bajila Chonya Bashora (2014) eKLR**. The Respondents further submitted that they did not need to prove lack of Sale Agreement; Lack of Land Control Board Consent; Lack of Executed Transfer Document and Acknowledgment Receipt of the Purchase Price since one cannot prove a negative. Further, that the burden of proving all requisite conveyancing documents was upon the Appellant who alleges to have legally acquired the suit land. To support these arguments, they relied on the decision of **Francis Maina Njogu Vs Nicolas Kiragu Ngacha & 3 Others Kerugoya ELC Case No. 102 of 2014**. They reiterated that the title deed in possession of the Appellant was obtained illegally and or fraudulently and ought to be revoked. Further, that the 1<sup>st</sup> Respondent never sold suit land to the Appellant and the Appeal should be dismissed with costs.

### Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Appellant legally acquired land parcel number Kajiado/ Ol choro Onyore/ 250 from the 1<sup>st</sup> Respondent and if the Respondents should be permanently restrained from it.
- Whether the Appeal is merited.

As to whether the Appellant legally acquired land parcel number Kajiado/ Ol choro Onyore/ 250 from the 1<sup>st</sup> Respondent and if the Respondents should be permanently restrained from it.

The Appellant in the lower court claimed to be the proprietor of land parcel number Kajiado/ Ol Choro Onyore/ 250 hereinafter referred to as the 'suit land' which he purchased from the 1<sup>st</sup> Respondent which fact the 1<sup>st</sup> Respondent has disputed. PW2 in his testimony in the lower court confirmed that he introduced the Appellant to the 1<sup>st</sup> Respondent after which he bought the suit land from him. The 1<sup>st</sup> Respondent denied selling the suit land to the Appellant and insisted he had always utilized the said land. The 2<sup>nd</sup> Respondent contended that the 1<sup>st</sup> Respondent gave him the suit land as his inheritance and he commenced building thereon. The Appellant as PW1 admitted that although he bought the suit land in 1982 he had never cultivated it. He further testified that he paid Kshs. 250/= per acre but was not sure. I note that PW2 actually disputed this figure which was quoted by the Appellant, who had testified that he entered into a verbal agreement with the 1<sup>st</sup> Respondent and paid the said amount in PW2's office. I note in the lower Court, the Appellant did not produce a Sale Agreement, Consent of the Land Control Board, Transfer Form or proof of payment of purchase price to confirm how he acquired the suit land from the 1<sup>st</sup> Respondent. He however produced the Mutation Form to confirm how Kajiado/ Ol Choro Onyore/ 239 was subdivided into 248, 249 and 250 respectively. It was his testimony that he bought the suit land in 1982 and obtained the Certificate of Title on 22<sup>nd</sup> March, 1982. Further, that prior to 2015, when an intruder sought to fence the suit land, the 1<sup>st</sup> Respondent called him and advised him to resolve the issue. He testified that he never settled on the land but in 2003, he had taken a Surveyor thereon when he got information that the beacons had been tampered with. He however confirmed that he did not have any report from the Surveyor. I note the trial Magistrate in his judgement explained that although the Appellant held the title to the suit land, he did not produce any documents including the Transfer Form, Sale Agreement, Consent of the Land Control Board to prove the process he adhered to in its acquisition. From the court records, I note the Appellant produced a Copy of the Certificate of Title, extract of the Green Card, Certificate of Official Search and a Receipt to prove his averments that he was the owner of the land. The Land Registrar as PW3 confirmed that it is the 1<sup>st</sup> Respondent who had signed the mutation forms for Kajiado/ Ol Choro Onyore/ 239 which was subdivided into 248, 249, and 250 but did not explain why there was a cancellation to the said Mutation Form. The 1<sup>st</sup> Respondent denied selling the suit land, confirmed subdividing Kajiado/ Olchoro Onyore into two portions only out of which he sold 249 to PW2. In his pleadings he pleaded fraud and alleged that the Appellant had colluded with PW2 to further subdivide and transfer the 1<sup>st</sup> Respondent's land to the Appellant. He further alleged that the Appellant fraudulently created the suit land without his consent. I note in the testimony for PW2, he confirmed having purchased Kajiado/ Olchoro Onyore/ 243 and 249 from the 1<sup>st</sup> Respondent and introduced the Appellant who purchased Kajiado/ Ol Choro Onyore/ 250. This I note is contrary to the averments of the 1<sup>st</sup> Respondent that he only subdivided Kajiado/ Ol Choro Onyore/ 239 into 248 and 249 respectively. The Land Registrar as PW3 confirmed that the Mutation for Kajiado/ Ol Choro Onyore/ 239 which included subdivisions to 248, 249 and 250 were validly registered by the 1<sup>st</sup> Respondent but did not avail any documents to support the transfer of the suit land to the Appellant. At this juncture, I wish to refer to section 109 of the Evidence Act which provides that: **'The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'**

In the case of **Francis Maina Njogu v Nicolas Kiragu Ngacha [2017] eKLR** the Court held that: **'Therefore the plaintiff having pleaded and testified that the transfer of the suit land to the defendant was fraudulent, it was the duty of the defendant to demonstrate that infact the plaintiff executed a sale agreement to that effect because the plaintiff cannot be expected to prove the negative. And since the defendant's testimony is that he paid Ksh. 680,000 for the suit land and an agreement was executed by a lawyer to that effect, nothing would have been easier than to produce that agreement.'**

Further in the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that: **"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."**

To my mind, I opine that since there was a Counterclaim seeking for cancellation of the Appellant's title, the evidentiary burden of proof shifted to him to produce documents to prove how he had acquired the suit land. It is trite that transaction to land is a process and whosoever claims ownership has to provide documents to that effect. From the proceedings in the lower court, except for producing the Certificate of Title, Excerpt of the Green Card and a Receipt, the Appellant did not produce proof of payment of purchase price, Consent of the Land Control Board as this was a controlled transaction in respect to agricultural land and Transfer Form. Further, he confirmed that he had never settled on the suit land since 1982 but took the Surveyor in 2003. It is against the foregoing and in associating myself with the decisions I have cited above, I find that the Learned Magistrate was actually right as the transaction in respect of the suit land from the 1<sup>st</sup> Respondent to the Appellant was devoid of supporting documents and I opine that the Appellant's Certificate of Title alone cannot stand especially where it has been challenged. I am hence unable to restrain the Respondents from the suit land.

It is against the foregoing that I find the Appeal unmerited and will proceed to dismiss it with costs to the Respondents.

**Dated Signed and Delivered via email this 9<sup>th</sup> Day of June, 2020**

**CHRISTINE OCHIENG**

**JUDGE**